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No. 40.

Br. of Hager for

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Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 40

CHESAPEAKE & OHIO RAILWAY CO., Plaintiffs in Error,

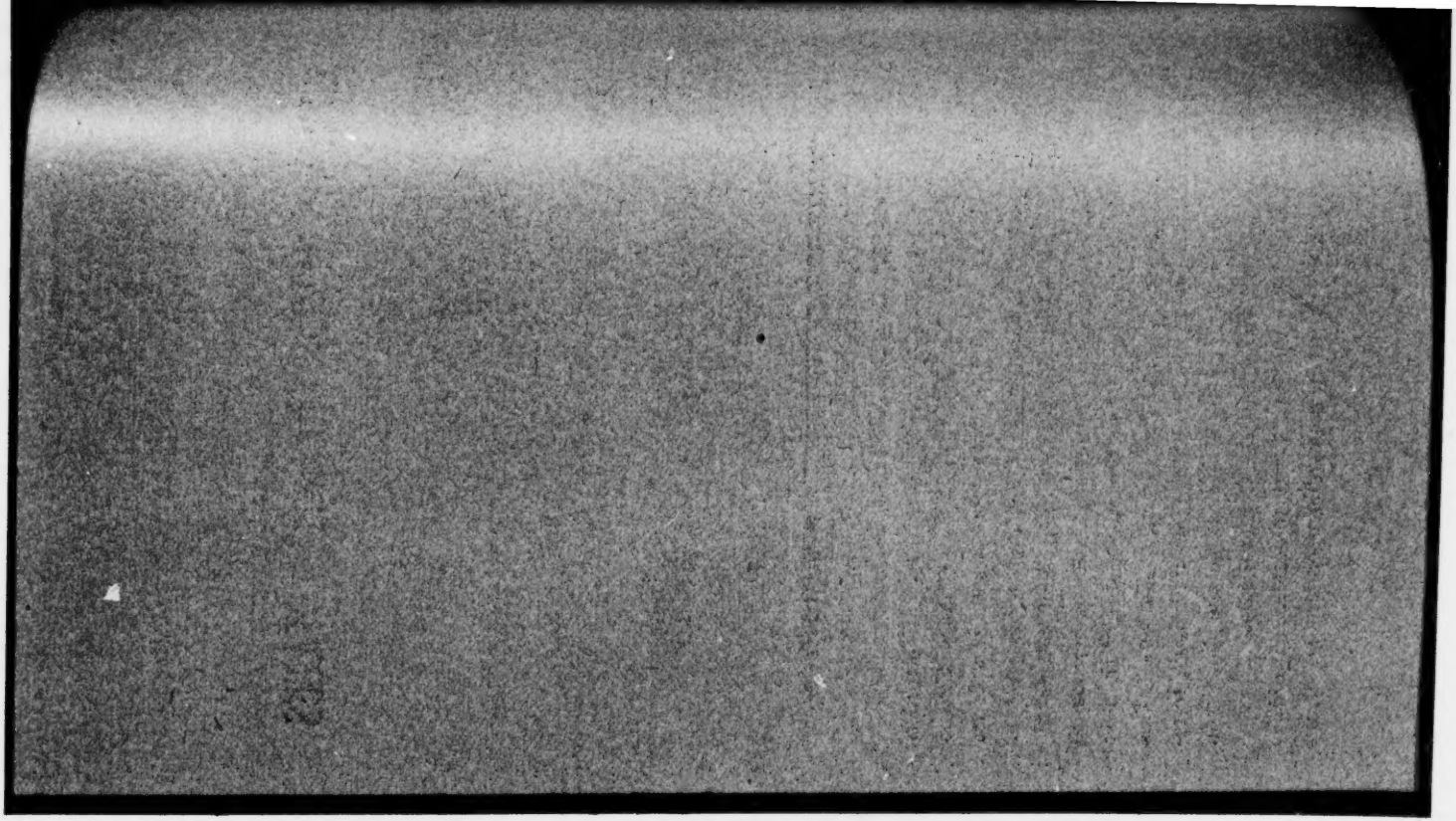
versus

LUCY DIXON, ADMINISTRATOR OF ALEXANDER DIXON, DECEASED, R. H. CHALKEY AND WILLIAM SLIDES, Defendants in error.

Brief for Defendants in Error.

JAMES ANDREW SCOTT,
Attorney for Defendant in Error.

JOHN H. HAGER,
R. S. DINKLE,
Of Counsel.



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1899.

No. 273.

CHESAPEAKE & OHIO RAILWAY CO., Plaintiff in Error,

VERSUS

LUCY DIXON, ADMINISTRATRIX OF ALEXANDER DIXON, DECEASED, R. H. CHALKEY AND WILLIAM SIDLES, Defendants in Error.

BRIEF FOR DEFENDANT IN ERROR.

The principal error relied upon by the plaintiff in error, in its assignment of errors, is the failure of the Boyd Circuit Court to remove the cause to the United States Circuit Court for the District of Kentucky after the filing of the petition found on page 4, and the bond found on page 5 of the record. By the terms of the bond the plaintiff in error undertook to "enter in the said Circuit Court of the United States, on the first day of its next session, a copy of the record in said suit." This was not done nor was there any further attempt made to remove said cause, and by its failure to do so the plaintiff in error abandoned its right of removal, if it ever existed.

It was competent for the State Court to decide, as it did decide, that the cause was not removable upon ground of the

joint liability of the plaintiffs in error, two of whom are residents of Kentucky. By the terms of the removal statute the failure of the State Court to remove the cause was no bar to the removal proceedings, and while the record shows, page 3, that the petition for removal was filed at the January term, January 30th, 1895, the case was continued to the September term, October 8th, 1895, when the answer was filed of record which had been filed in vacation, and the trial was afterwards had. There was no forcing of an answer, or a trial after the petition for removal had been had.

The first day "of its next session" of the Circuit Court of the United States for the District of Kentucky was October —, 1895, and the place where it would next convene nearest to Boyd county, Kentucky, was Covington, Kentucky, but before filing its answer, on October 8th, 1895, in the Boyd Circuit Court, or before going into trial, the plaintiff in error did not suggest to the court that it had filed the record in the Federal Court, or that it would do so, or upon that account object to filing the answer or going into trial. All of this is accounted for when it is remembered that Judge Barr, judge of the United States Court for the District of Kentucky, had, on the — day of ———, 1895, in the case of ——— v. ———, decided that a similar case was not removable.

Joinder of Causes of Action.

Upon the subject of the joinder of causes of action the Kentucky Civil Code of Practice provides:

> "Section 83. Several causes of action may be united, if each affect all the parties to the action, may be brought in the same county, and may be prosecuted by the same kind of action; and if all of them be brought * * * (subsection 6) for injury to persons or property."

Joint Trespasses.

The right of an injured party in Kentucky to recover against joint trespassers for the same injury without regard to the form of the trespass, whether vi et armis, trespass on the case or otherwise, has been fixed by statute as follows:

> "Section 12. In actions of trespass it shall be lawful for the jury to assess several or joint damages against the several defendants, and when the jury finds several damages the judgment shall be in favor of the plaintiff against each defendant, for the several damages, without regard to the amount of damages laid in the declaration."

This statute has been in force ever since February 14th, 1839, and was construed in the case of Buckles v. Lambert, 4 Metcalfe, 330; Alexander, &c. v. Humber, 86 Ky., 565, and in the later case of Central Passenger Railway Co. v. Kuhn, 86 Ky., 578, where the Kentucky Court of Appeals used the following language:

> "This act, which has been held to apply to all kinds of trespasses, and that modifies the rule of common law, and is more a question of practice than of right, has not been repealed, expressly or by implication, by either the Revised or General Statutes, or by the Code of Practice. There is no provision of the Code of Practice with regard to the remedy in conflict, or inconsistent with the provisions of the act of 1839, nor any provisions of the General Statutes in conflict with, or inconsistent with, its provisions or title, that treats of this subject.
>
> "This statute affords a remedy against all trespasses with the right on the part of the jury to punish the wrongdoer to the extent of his participation in the wrongful act; and if one is more guilty than the other, to punish him the more severely. * * *
>
> "It is an equitable statute, and in this case is exemplified by punishing the one more severely whose duty it was to stop until the train had passed, and who could have avoided the danger by the exercise of the slightest care."

In that case the action was brought against a railroad company and a street railway company jointly, the verdict being for $5,000 against the one and $1,000 against the other.

The averment in the petition is:

Was the Injury the Result of Joint Negligence?

"She says that on the 22d day of September, 1894, while crossing the track of the defendant, at the crossing of the Ashland & N. turnpike road, and within the corporate limits of said town, the said intestate, Alexander Dixon, was by the negligence of the defendant, the Chesapeake & Ohio Ry. Company, and of its agents and servants, R. H. Chalkey and Wm. Sidles, who were in charge thereof, run over and instantly killed by one of defendant's passenger trains. * * *

"At the time and place when and where plaintiff's intestate was injured as aforesaid the defendants, R. H. Chalkey and Wm. Sidles, were, and for a long time before had been, servants in charge and control of said train, and then and there were, and for a long time had theretofore continuously been, respectively engineer and fireman, and said negligence of the corporate defendant was done by and through its said servants, and other of its servants then and there in its employment, and said negligence was the joint negligence of all the defendants."

The petition is found on page 2 of the record, and it will be seen that the direct charge is made that the killing was caused by the negligence of the three defendants, and that it was jointly done.

The question presented here is not whether a servant, while in the discharge of his duties for his master, could so negligently injure another as to absolve the master from the consequences of his act, as seems to be contended for by the plaintiff in error; but the question is whether the master can be liable jointly with his servant for acts done without his personal presence, for if he can every presumption will be indulged, after verdict and judgment, that the evidence showed

his joint liability. From the opinion of the Kentucky Court of Appeals, on page 18 of the record, it will be seen that the train which killed Mr. Dixon was running at a rapid rate of speed through the city of Catlettsburg toward a notoriously public crossing, which could not be seen more than six or seven hundred feet away, on account of a curve in the track and intervening houses, and that the crossing was such a one as to require the presence of a flagman. The train was fifteen minutes late, and whether it gave a signal of its approach or not does not affect the question of the company's negligence in permitting the view to be obstructed by intervening houses, or by failing to erect a gate or place a flagman at the crossing. The presumption is fair that the master ran the train behind time; that it knew that the crossing would probably be crowded, in which case the engineer could not see the decedent in time to check the train after rounding the curve; that notwithstanding this he was required to make the speed of nearly a mile a minute, and that to avoid an injury a flagman was required at the crossing. The engineer and fireman had nothing to do with fixing the schedule time; with placing a flagman at the crossing, or with removing the obstructions to the view. So that in enumerating the negligent acts of the plaintiffs in error which contributed to the death of the decedent it will be seen at a glance that all of the negligence was not that of the engineer and fireman upon the one hand, nor of the company upon the other; but that it was the joint negligence of all of them.

As has been repeatedly held in Kentucky, the cause of action is the injury (Smith v. Bogenschutz, 14 Kentucky Law Reporter, 305), and it follows that all who contribute to an injury are jointly (or, at the election of the plaintiff, severally) liable; but as there can be but one satisfaction for a tort, all who are jointly liable must be sued together if at all.

In this case the plaintiffs in error, Chalkey and Sidles, filed separate answers, and thereby sought to make a separable con-

troversy, but this can not be done, as decided by Judge Shiras in Ferguson, &c. v. Chicago, &c., Ry. Co., 63 F. E. R., 179, where, after a review of the authorities, this language was used:

> "It is well settled that the question of the existence of a separable removable controversy is to be determined upon the construction of the allegations of the petition: that the defendants, by separate answer * * * * can not create a separable controversy, within the meaning of the statute, out of a cause of action upon which the plaintiff has declared jointly; and, therefore, the true query is whether the case, as made and set forth in the petition or declaration of the plaintiff, is or is not separable into parts, so that any one of the parts in controversy will be presented with citizens of one or more States on one side and citizens of different States on the other, which can be fully determined without the presence of other parties to the suit, as it has been begun. (Ayers v. Wiswall, 112 U. S., 187.) If the plaintiff in fact counts or declares upon one cause of action and no more, then the case can not contain a separable controversy."

The above is an admirable statement of the contention of the defendant in error in this case, and it is borne out by the following cases: Ayers v. Wiswall, 112 U. S., 187; Railroad Co. v. Ide, 114 U. S., 52; Pirie v. Tvedt, 115 U. S., 41; Starn v. City of New York, 115 U. S., 248; Sloan v. Anderson, 117 U. S., 280; P. C. G. N. Co. v. Mador & S. Canal Co., 118 U. S., 264; Little v. Giles, 118 U. S., 596, 600, 601; L. & N. R. R. Co. v. Wangelin, 132 U. S., 599; Torrents v. Shedd, 144 U. S., 527, 550; Connell v. Smiley, 156 U. S., 335, 340; Powers v. Chesapeake & Ohio Ry. Co., 169 U. S., 673.

In the last cited case the cases of Warrax v. C., N. O. & T. P. Ry. Co., 72 Fed. Rep., 637; Hukill v. M. & B. S. R. R. Co., 72 Fed. Rep., 745, are referred to, but the doctrine contained in those cases is not adhered to. On the contrary, this court, through Mr. Justice Gray, said:

> "It is well settled that an action of tort which might

have been brought against many persons or against any one or more of them, and which is brought in a State court against all jointly, contained no separate controversy which will authorize its removal by some of the defendants into the Circuit Court of the United States, even if they file separate answers and set up different defenses from the other defendants, and allege that they are not jointly liable with them, and that their own controversy with the plaintiffs is a separate one; for, as this court has often said, 'a defendant has no right to say that an action shall be severed which plaintiff elects to make joint. A separate defense may defeat a joint recovery, but it can not deprive a plaintiff of his right to prosecute his own suit to a final determination in his own way. The cause of action is the subject-matter of his controversy, and that is for all the purposes of the suit, whatever the plaintiff declares it to be in his pleadings.'"

In that case Powers sued the Chesapeake & Ohio Ry. Co., the conductor, engineer and fireman, and to that extent the case is exactly like the one at bar. Applying the rule laid down in that case, and in a long line of decisions of this court cited in support of it, can it be said that by refusing to remove this cause from the State to the Federal Court plaintiffs in error were deprived of any right under the Constitution and laws of the United States, as it contends?

It is respectfully submitted that it has not.

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